IN THE

# Supreme Court of the United States

OCTOBER TERM 1948

No. 65

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CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.,

*Petitioners,*

*v.*

ACME FAST FREIGHT, INC.,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF


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## RESPONDENT'S BRIEF

### Question Presented

Respondent, a freight forwarder regulated under Part IV of the Interstate Commerce Act, 49 U. S. Code §1001 *et seq.*, and the petitioner railroads, utilized by respondent in the transportation service it provides, each issue to their shippers, and publish as part of their tariff classifications, the uniform domestic straight bill of lading, which provides, as a condition of recovery for freight loss or damage, for the filing of written notice of claim with "the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose lines the loss . . . occurred . . ."

Respondent submits, and the Court of Appeals decided, that notice by a shipper or consignee to respondent satisfies this requirement, and that no further notice by respondent to a rail carrier is necessary to establish respondent's right of subrogation given by the Carmack Amendment, made applicable to freight forwarders by §1013 of title 49.

## Statutes Involved

§1013 of the Interstate Commerce Act, Part IV, provides in part:

> "The provisions of Section 20(11) and (12) of this title * * * shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20(11) and (12)."

§20(11) and (12) of the Interstate Commerce Act, together commonly designated as the Carmack and Cummins Amendments to the Hepburn Act, provide in part:

> "(11) Any common carrier, railroad, or transportation company subject to the provisions of this chapter, receiving property for transportation * * * shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass. * * *

"(12) The common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroads or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

§1002 of the Interstate Commerce Act, Part IV, definitions, provides in part:

"(5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title."

* * * * * * *

"(7) The term 'service subject to this chapter' means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this chapter to perform or provide; but such term shall

not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to sections 401 . . . 681 of this title are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 303(b)(7a) [motor vehicle transportation incidental to air carriage] of this title is utilized."

## Bill of Lading Provision Involved

Section 2b of the uniform bill of lading provides, in part:

"Sec. 2.(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury of delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that carrier has disallowed the claim or any part or parts thereof specified in the notice. * * *"

## Statement

Respondent is a freight forwarder, sometimes denominated a "carloading company", a transportation service consisting of combining numerous less than carload shipments received at its stations or picked up by motor trucks, shipping these as a carload or truckload, and usually providing immediate truck delivery at destination

(R. 3). Respondent as well as petitioners employ and publish as part of their tariff classifications, the uniform domestic bill of lading, with the claim clause quoted above (R. 3, 4). Petitioners are railroads against which respondent has subrogation claims for amounts it has been obliged to pay shippers for freight damaged or destroyed in rail transportation, and in which the sole or principal defense is that no timely notice of claim was given a rail carrier, although timely notice was given by the shipper or consignee to respondent (R. 5).

The practice has been for respondent, after receipt and investigation of a shipper's claim against it, to forward the claim papers to the responsible rail or truck carrier. Since in forwarder transportation delivery to the rail carrier follows closely upon delivery to the forwarder, but some time is necessary after receipt of the shipper's claim to identify the shipment and carrier responsible for loss, and file claim upon it, instances necessarily occur and will continue to occur where the shipper's claim is within nine months of loss, but refiling with the rail carrier is not. In these instances petitioners assert that respondent is without a remedy (R. 4, 5, 48).

It has, however, never been the practice of rail carriers to apply or enforce any requirement of notice of claim in the interline settlement of subrogation claims arising under §20(12) between carriers earlier subject to the act, and it was conceded in the courts below and is conceded here that "the bill of lading conditions are not applicable to such claims" (R. 4, 49).

Subsequent to the enactment of Part IV in 1942, the Association of American Railroads felt called upon to

1 We suppose this to be the point of the statement in petitioner's brief, p. 22, "Section 20(11) * * * brought about the regulation of initial rail carriers—not as between carriers—but in their relations with their shippers."

issue an opinion, written by a General Attorney of the Pennsylvania Railroad, as to the effect of 1013 upon the bill of lading requirement of notice of claim (R. 50 *et seq.*). This opinion concluded that in spite of the enactment of Part IV, and the granting of the subrogation rights of 20(12) to freight forwarders as claim against railroads, the requirement of notice of claim still existed, since otherwise a preference would be accorded freight forwarders as compared with shippers at large.

Respondent, who had approximately sixty claims for loss or damage in rail transportation refused for this reason, accordingly sought a declaratory judgment against six of the rail carriers involved. Judgment was rendered on cross motions made in the action, by respondent to strike the answers and for summary judgment, and by petitioners to dismiss the complaint and for summary judgment. Petitioners' motions were granted in the District Court. This was reversed by the Court of Appeals.

While this appeal properly involves only the granting of petitioners' motion to dismiss (R. 84), we commend the Court's consideration of the entire record in the interests of an early determination of a question we believe to be solely a legal one.

## Opinions

The opinion of the late Judge Bright in the District Court held that since no joint rates were permitted between forwarders and railroads, such as were permitted between forwarders and motor carriers, the subrogation provisions of 1013 do not apply to their claims against railroads; that in the enactment of Part IV there was no congressional intent to alter the preexisting status of forwarders as shippers in their relation to railroads; that

any other conclusion would be contrary to rail tariffs, rules and practices; and that since shippers in forwarder transportation had no privity of contract with the railroads they had no claim against them for loss or damage, and hence the freight forwarder became subrogated to nothing on paying for a loss occurring in rail transportation.

The opinion of the Court of Appeals concluded, from the language of the statute and the House Committee report presenting it, that recourse against railroads was intended; that privity of contract was not a condition of the common-law liability of connecting or underlying carriers for losses in their possession, deriving rather from the law of bailment; that §1013, like the Carmack Amendment it incorporated, was not intended to curtail existing rights of shippers against the carrier in whose possession loss occurred; and that at all events, the freight forwarder, designated by the statute receiving and delivering transportation company and required by the statute to issue a through bill of lading, was a receiving or delivering carrier within the meaning of the bill of lading, so that timely notice to the forwarder established the liabilities of all responsible carriers, and the consequent right of subrogation.

## Legal and Legislative Background of Part IV

While this action simply involves a reenactment of the Carmack and Cummins amendments, petitioners' argument, both here and in the courts below, has gone so far afield of this that it may be helpful to review the legal and legislative background of Part IV, as well as the particular section chiefly involved.

While early decisions drew a distinction between common carriers and forwarders in the strict sense of the term—freight brokers and others who merely arranged transportation as shipper's agent, as export forwarders do today—it also became early established that the status and responsibilities of a common carrier was not confined to those owning or operating the means of transportation, in whole or in part, but apply to all who undertake or hold themselves out to provide transportation to the public generally.[2] The fact of a contract for transportation overrode express stipulations for liability as forwarder only (*Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258), and the reasons for imposing such liability, as stated in a leading case, were similar to those supporting the Carmack amendment.

*Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 184:

> * * * Express companies frequently carry over long routes, at great distances from the places of destination of the property carried, and from the residence of its owners. If in the course of transportation a loss occurs through the want of care of managers of public conveyances which they employ, the carriers or their servants are at hand. They are best acquainted with the facts. To them those managers of the public conveyance are responsible, and they can obtain redress much more conveniently than distant owners of the property can. * * *

The operation of this rule was, however, largely offset by the upholding of stipulations relieving carriers of

2. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 177, 185; *Buckland v. Adams Express Co.*, 97 Mass. 124; *Rare v. American Forwarding Co.*, 146 Ill. App. 388; *Kettenhotten v. Globe Transfer & Storage Co.*, 90 Wash. 645, annotated 42 L.R.A. (N.S.) 902.

responsibility for losses in the hands of other carriers they employed, or confining responsibility to liability for their own negligence. This unsatisfactory condition was rectified by the Carmack amendment, which as originally enacted applied to all common carrier interstate transportation (*Roberts, Federal Liabilities of Carriers*, 2 ed. §360) but was, by the first Cummins amendment of 1915, limited in application to regulated carriers.

A substantial type of transportation developed in which concerns combined many less carload shipments into carloads, made their own charge to the shipper, and obtained its operating revenue from the differential between the two rates. This was originally principally conducted between larger centers of population, but later attained its greatest growth by including immediate truck delivery to destination, making the service faster, cheaper, and more convenient than rail freight shipments, and rendering a service particularly useful to small and off-line consignees whose volume of shipments or location denied them use of carload shipments or rates. *House Report #1172, 77th Congress, First Session*, page 2.

Regulation of freight forwarders on the pattern of other parts of the Interstate Commerce Act was recommended by the Commission as early as its annual report of 1930. A freight forwarding investigation led to the same conclusion, although a majority of the Commission favored operation of forwarder service by the Railway Express Agency or a similar railroad-owned monopoly. 229 I.C.C. 201, 307. The minority opinion of the late Commissioner Eastman considered that competing freight forwarders, employing or combining rail and truck transportation in the fields in which each was most efficient,

afforded a type and efficiency of service that railroads had not duplicated and could not be expected to; that "The forwarding companies are not shippers in the ordinary sense, and have much the same relation to railroads and other carriers whose services are utilized as have the Railway Express Agency and the Post Office Department" (229 I.C.C. 315); and that "it is plain that the conditions under which they load and consign carloads are very different from those which are encountered by an ordinary carload shipper, and require, in various respects, different treatment by the railroads." 229 I.C.C. 318.

Upon the passage of the Motor Carrier Act of 1935, the question arose of whether forwarders' utilization of motor carriers made them motor carriers within the definition of that act, a question important in regard to their right to maintain their existing arrangements with motor carriers. The Commission, and subsequently the Court, held them not to be motor carriers within the definition of that act. *Acme Fast Freight, Inc. Motor Carrier Application*, 2 M.C.C. 415, 8 M.C.C. 211; *Acme Fast Freight, Inc.* v. *United States*, 30 Fed. Sup. 968, aff. 309 U. S. 638.[3] Since the result of this threatened to curtail their motor delivery or pick-up service practically to rail terminal areas, and disrupt an established and substantial transportation service to off-line points, it was a considerable factor in the passage of Part IV. *House Report to accompany S210, #1122, 77th Congress, First Session*, pp. 2-3.

Part IV, enacted May 16, 1942, applied to freight forwarders the same type of regulation theretofore applied

3. Compare petitioners' brief, p. 8 "In that case * * * it was held that respondent was not a common carrier" with the District Court's opinion, p. 973:

"While the four forwarding companies are doubtless responsible to their customers as common carriers at common-law, we think it clear that none of them is 'a common carrier by motor vehicle' within the meaning of the Motor Carrier Act * * *"

to railroads, pipelines, express companies, motor carriers, and water carriers. Authority was granted by §1008 for other regulated carriers to establish special assembling and distribution rates or charges, to be available to freight forwarders and others employing such carriers under like conditions. Subsequently, by amendment to §1009 of February 20, 1946, continuation of joint rates with motor carriers was authorized, pending study and determination by the Commission of equitable arrangements with them.

In connection with petitioners' argument that no change in the relation of freight forwarders with other regulated carriers was contemplated, we may quote the House report in dealing with §1008.

*Report to accompany S 210, #1172, supra*, page 12:

> "The decision of the committee not to include permanent authority for joint rates between forwarders and carriers subject to parts I, II, and III was not based on the belief that freight forwarders should be required to pay full published rates to such carriers in all cases. On the contrary, the committee is of the opinion that there is ample justification for rates available to forwarders (and to others who utilize the services of carriers under like conditions), lower than the rates available to shippers generally, on account of the special conditions under which forwarders and certain other persons utilize the services of carriers in assembling and distributing operations.
>
> * * *
>
> "Among the circumstances and conditions under which carriers perform service for freight forwarders, and which warrant the establishment by such carriers of the rates authorized by this section, are the following:

"(1) Solicitation expense to the carriers is virtually eliminated in the case of service they perform in connection with assembling and distributing operations of freight forwarders.

"(2) The clerical and detail work of the carrier (billing, accounting, rating, classifying, etc.) is substantially reduced in the case of such traffic. This is due partly to nature of the traffic and partly to the service performed directly by the forwarder.

"(3) The carrier's work in handling and investigating claims for loss or damage or overcharge is greatly reduced, due to the forwarder's responsibility to the shipper for the entire through movement.

"(4) The carrier receiving property from individual shippers, for transportation to a concentration point, is saved time and expense by reason of not having to make delivery of the separate shipments to individual consignees. Likewise, carriers who perform service for forwarders beyond the break-bulk point are saved time and expense, due to receiving at a single stop shipments destined to various individual consignees.

"(5) Forwarder traffic provides tonnage for short-line carriers, which would not otherwise be available to such carriers, in the case of shipments originating at, or destined to, distant points.

"(6) A forwarder moves traffic in regular established channels, in fairly predictable volume, thus enabling the carriers whose services are utilized to allocate equipment in advance, and to depend on a more or less steady flow of traffic."

From the date of the first Cummins amendment in 1915 to the enactment of Part IV, freight forwarders, as

common carriers not subject to the act, were at liberty to confine their responsibility to loss caused by their own negligence, escaping liability for losses in the hands of underlying rail or truck carriers, and some of them made this their practice. *Judson Sheldon Corp.*, 260 I.C.C. 473, 475, 478; *W. J. Byrnes & Co.*, 260 I.C.C. 55, 57, 59. When this comprehensive regulation of freight forwarders was undertaken, the extension of the Carmack amendment to them was considered, and in the circumstances of their operations it was considered logical that they, who dealt with the shipper, should issue the through bill of lading evidencing the shipment and that they should be responsible to the owner for the whole of the transportation service provided by them. A proposal was made and rejected in committee that they be relieved of liability for loss between their terminals.[4] Since in forwarder transportation the actual carriage is in the hands of rail or motor carriers, and loss or damage usually occurs while the freight is in their possession, it was equally logical to give forwarders a right of subrogation measured by the amount they were obliged to pay in discharge of such liabilities, against the primarily responsible carrier, and the House Committee report stated that this was intended:[5]

> *House Report 1172, supra*, p. 15.
>
> "Section 413, *Bills of Lading and Delivery of Property.*
>
> "This section makes the provisions of section 20(11) and (12) of the Interstate Commerce Act applicable with respect to freight forwarders. The

4 87 Cong. Rec. 8214 "Mr. [Chairman] Lea * * * The Cummins amendment requires that the initial carrier should assume that responsibility [of issuing bills of lading] and that liability is up here against the forwarder."

5 87 Cong. Rec. 8212 "Mr. [Chairman] Lea * * * One demand was that a freight forwarder be relieved from responsibilities as the initial carrier to the shipper of the freight from the time he receives it until it reaches the other end. The shippers of the country would never be willing to have that change in the policy of the present law, put in there for their benefit."

effect of this will be to require freight forwarders to give their customers a bill of lading covering the service performed by the freight forwarder, under which the freight forwarder will assume liability for the movement of the property from point of origin to point of destination. The freight forwarder will be considered both the receiving and delivering transportation company, for purposes of section 20(11) and (12) but in case the loss of or damage to the property transported occurs on the line of a carrier whose service the freight forwarder utilizes, the freight forwarder will have the right to subrogation against the carrier under section 20(12)."

There was not, however, unanimity in this view of the section, for Representative Wolverton, ranking minority member of the House Committee, in commenting on the act after its introduction by Chairman Lea, stated (87 Cong. Rec. 8216):

"In its explanation of section 413, the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20(11) and (12) of Part I applicable to freight forwarders. It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, *the latter is the only person to which such shipper is entitled to look for recovery of damages*, and it is in this sense that the forwarder is to be deemed both the receiving and delivering transportation company. *If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right of subrogation under section 20(12), since its own shipper never had any right of action against such carrier.* The forwarder's recovery against the carrier would be upon the bill of lading issued to

it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in section 413 to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved."

We have italicised the reason assigned for this different view of the statute's operation, as it will be examined at a later point in the brief.

## Summary of Argument and Authorities

I. The requirement of notice to the receiving or delivering carrier is met by notice to the party denominated by statute receiving and delivering transportation company. The bill of lading should be interpreted in the light of the statute.

*Northern Pacific Railroad Co. v. Wall*, 241 U. S. 87.

The definition of freight forwarder in the statute is the definition of a common carrier.

*49 U. S. Code*, 1002(5).

The legitimate objects of notice of claim are met by notice to a freight forwarder, and the consequences of their liability for loss are the same as any other carrier subject to the act.

II. Bill of lading conditions of liability do not apply to subrogation claims against connecting carriers.

In transportation subject to the Carmack Amendment the initial carrier's bill of lading is the only one operative as to conditions of liability.

*Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383;

*Texas & Pacific Ry. v. Leatherwood*, 250 U. S. 478;
*Galveston Wharf Co. v. Ry. Co.*, 285 U. S. 127;
*Mexican Light & Power Co. v. Texas Mexican Railway Co.*, 331 U. S. 731.

This construction attaches to a reenactment of the statute, especially one directed to apply "with the same force and effect" as the original act.

*State Tonnage Tax Cases*, 79 U. S. 204;
*Johnson v. Manhattan Railway Co.*, 289 U. S. 479.

Subrogation involves succession to the rights of the discharged creditor, in this instance the owner of the shipment.

*Hages v. Ward*, 4 Johns. Ch. 123;
*Stowers v. Wheat*, 78 Fed. 2d 25, 30.

A remedy provided by specific statute is not an unreasonable preference.

*Townsend v. Little*, 109 U. S. 504;
*Wight v. United States*, 167 U. S. 512, 518.

III. The statute gives a forwarder recourse, in terms, against a "railroad * * * on whose line the loss, damage, or injury shall have been sustained."

Limiting the statute's application to recourse against other freight forwarders goes beyond the permitted bounds of construction.

*Washington Market Co. v. Hoffman*, 101 U. S. 113;
*U. S. v. Lexington Mill Co.*, 232 U. S. 399.

"Service subject to this chapter" is defined as all the service "performed or provided by a freight forwarder", with the exception of air carriage, and it applies equally to the liability and the subrogation provisions of the act. The instance of connecting carriers is an established case for subrogation, and complete recourse was contemplated by §20(12).

*Palmer* v. *Aquilines, Inc.*, 42 F. S. 239; affd. 135 Fed. 2d 689;
*Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 184;
40 *Cong. Rec.* 9580;
*Kansas City & M. Ry. Co.* v. *N. Y. C. & H. R. R. Co.*, 110 Ark. 612, 163 S. W. 171.

Recovery against a carrier in whose possession a loss occurs is not dependent on privity of contract.

*New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344;
Hutchinson on *Carriers*, 3 ed. §§152, 236, 1305, 1312.

The remedy against connecting carriers was not curtailed by the Carmack Amendment.

*Chicago & N. W. Ry. Co.* v. *Whitnack Produce Co.*, 258 U. S. 369;
*Cincinnati & Texas Pacific Ry.* v. *Rankin*, 241 U. S. 319;
*Mexican Light & Power Co.* v. *Texas Mexican Railway Co.*, 351 U. S. 734;
*Definition of Freight Consolidators*, 43 M.C.C. 527, 535;
*Freight Forwarder Insurance*, 260 I.C.C. 275.

Through or joint rates have no bearing on carrier responsibility:

*Norfolk & Western Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593;
*Galveston Wharf Co. v. Ry. Co.*, 285 U. S. 127;
*Mexican Light & Power Co. v. Texas Mexican Railway Co.*, 331 U. S. 731.

Railroad rules, tariffs, or practices cannot defeat the application of statute to them.

*Merchants Warehouse Co. v. U. S.*, 283 U. S. 501;
*Chicago Ry. v. McCaull-Dinsmore Co.*, 253 U. S. 97.

## POINT I

**A requirement of notice to the receiving or delivering carrier is met by notice to the party denominated by statute receiving and delivering transportation company.**

The terms of the bill of lading permit effectual notice to be given any of the parties who may be held liable for the loss, who thus have an interest in ascertaining the facts, or to whom the shipper will naturally turn for redress. The receiving and delivering carriers are the persons with whom shipper and consignee deal, and liable under the Carmack Amendment; the carrier issuing the bill of lading is the party whose receipt the shipper holds, and the carrier on whose lines or in whose possession the loss occurs is liable *quasi ex delicto* at common law. The Carmack Amendment having long antedated the drafting of this bill of lading, the "receiving or delivering carrier"

described in it is plainly the receiving or delivering common carrier, railroad, or transportation company of the statute. "This bill of lading was issued under that statute and should be interpreted in the light of it." *Northern Pacific Railroad Co.* v. *Wall*, 241 U. S. 87, 97. The statute having placed initial liability on the freight forwarder, and obliging it to issue the through bill of lading, the bill of lading description applies to it.

While it is doubtless a matter in the realm of semantics only whether respondent is called a common carrier, or a transportation company with all the attributes of a common carrier, it may be pointed out that neither the decided cases nor authoritative texts distinguish the two. No distinction is drawn by the Carmack Amendment between carriers who operate the physical means of transportation and those who contract for transportation, but employ the vehicles of others, for express companies have been subject to it since its enactment, and as originally enacted it applied to all interstate common carrier transportation. Neither is there a distinction in the definition of common carriers at common-law between express companies, operating principally in passenger train service, and dispatch or fast freight companies, such as the former Merchants Dispatch Transportation Company, operating in rail freight service over the lines of various roads.[7] On the contrary, when we recall the strictures at that time laid on legislation affecting the contracts of private carriers,

[7] *Read* v. *Spaniding*, 18 N. Y. Super. Ct. 395, 401, aff. 30 N. Y. 630; *Lyons Glove Co.* v. *Merchants Dispatch Transportation Co.*, 130 Iowa 327, 328 ("The evidence also sufficiently showed that the defendant was a common carrier"); *Merchants Dispatch Transportation Co.* v. *Bloch Bros.*, 86 Tenn. 302, 306 ("In very many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed"); *Merchants Dispatch & Transportation Co.* v. *Comforth*, 3 Colo. 280, 281 ("The Merchants Dispatch & Transportation Company is a common carrier"); *Merchants Dispatch Transportation Co.* v. *Keller*, 80 Ill. 473, 476 ("When defendant received the goods at Worcester its liability was that of a common carrier"); *Bare* v. *American Forwarding Co.*, 136 Ill. App. 388, 391 ("The defendant held itself out as ready

or business not affected with a public interest, it is most unlikely that the Hepburn Amendment was concerned with anything but common carrier transportation companies, and the disjunctive "common carrier, railroad, or transportation company" no more shows the contrary than it shows railroads not to be common carriers. The difference between express companies, regulated carriers since 1906, and freight forwarders is slight (*Freight Forwarding Investigation*, 229 I.C.C. 201, 317, per Eastman, Comm.); and difference only in detail is to be perceived between the statutes regulating each.

Petitioners make much of the fact that the word "carrier" was intentionally avoided in the drafting of this legislation. However, the definition of freight forwarder in the statute is itself the definition of a common carrier.

§1002(5). The term "freight forwarder" means *any person which * * * holds itself out to the general public to transport or provide transportation of property * * * for compensation* * * *." "Carrier" as used in the bill of lading is not to be construed in the limited sense of "rail carrier", but in the sense that it would be understood by shippers, and the best evidence of their

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to carry for every one and was therefore a common carrier"); *Corpus Juris Secundum, Carriers*, § 3(4), 7, 10

2 Cf. Elliott on *Railroads*, 3d, § 2016

"A transportation company not owning or controlling any means of conveyance itself but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its selection and employment is a common carrier. This has been held the proper view as to express companies, dispatch companies, and fast freight lines. As elsewhere shown, express companies, fast freight lines and the like are common carriers in all that the term implies."

Hutchinson on *Carriers*, 3 ed., § 84:

"Other carriers, under the names of dispatch companies, fast freight lines, and the like, have also come into existence, which conduct their business upon the same principles as express companies, that is by the employment of the means of transportation furnished them by others, and to which, for the same reasons, the same rigid rule of responsibility as to common carriers is applied."

understanding of the matter of this many thousands of claims annually filed with freight forwarders. They have a forwarder's bill of lading, they have been schooled to understand that the issuer is a proper party to file claim upon. Petitioners' own official construction of carrier is no more technical. A.A.R. Freight Claim Rule 30(a), submitted with opposing affidavits, defines carrier:

> "Any common carrier, including railroad, steamship, transfer or other transportation company."

Notice of claim provisions are no especial favorite of the law, as the nine months provided is the minimum the Carmack amendment allows, and the construction put upon the requirement has not been as unduly technical as the defendants would have it. So far as the form of notice is concerned, the Court has observed that "It is addressed to a practical exigency and is to be construed in a practical way." *Georgia, Florida, and Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 198. In the leading case of *Northern Pacific Ry. Co.* v. *Wall*, 241 U. S. 87, a requirement of notice of loss to a receiving carrier was held to be satisfied by notice to the delivering carrier, the court stating, page 92:

> "In these circumstances it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier, should operate as notice to the latter. This interpretation treats the stipulation as designed to be fair to both shipper and carrier, permits it to serve a useful purpose and gives due effect to the statute under which it was issued."

By the terms of the bill of lading, filed on file one of the responsible carriers preserves the shipper's rights against all; the legitimate object of the provision, of setting investigation of the claim in motion, is accomplished. There is as a practical matter no reason why notice to a freight forwarder is less effectual to start the process of investigation than an initial rail, water, or express carrier; in any case the initial responsibility to the shipper affords equal impetus to develop the facts and identify responsibility at the earliest date. From the standpoint of the shipper, in whose interests the Carmack amendment was mainly concerned, any other rule would be a backward step. It is even less reasonable in forwarder transportation than all rail, for example, to require, as a condition of the shipper's recourse against other responsible carriers, that he identify them and give notice to them as well as the agency with whom he deals. "If, as contended, a shipper must, in order to recover, first file his 'verified claim' with the connecting carrier who caused the injury, as provided in a separate bill of lading issued by such carrier, the shipper would still be under the burden of determining which of the successive carriers was at fault. Such a construction of the Carmack amendment would defeat its purpose, which was to relieve shippers of the difficult and often impossible task of determining on which of the several connecting lines the damage occurred." *Missouri, Kansas & Texas Ry. v. Harriman*, 227 U. S. 657, 672; *Chicago, Rock Island & Pacific Ry. v. Ward*, 244 U. S. 383, 387.

It is further to be observed that whatever the differences between freight forwarders and other regulated carriers in the physical conduct of their transportation services, there is no difference whatever in the practical consequences of their loss and damage liability. This has

to do, not with transportation, but with claim adjustment and litigation. The receipt of claims, the investigation of occurrence of the loss or damage, verification of the amount of loss, the obtaining of supporting papers, and not infrequently the burden of initial litigation of contested claims are borne in the first instance by the freight forwarder as by any other receiving carrier. And, of cardinal importance in the practical situation presented in this case, since the physical carriage of its freight is in the hands of its connecting or underlying carriers, the freight forwarder must usually rely on receipt of a claim from the shipper or consignee before it is in a position to know the full nature or value of the contents of the shipment or the amount of damage involved, and frequently whether there has been any loss or damage and hence whether there will be a claim against the underlying carrier. This is true, for example, of concealed damage, the occurrence of which is not known until the parcel is unpacked by the consignee. This is an entirely different position than a consignee receiving a damaged shipment, and a position in all respects similar to that of any other receiving or delivering transportation company. The fact that the connecting carriers are, in forwarder transportation, spared considerable work and expense by this screening of claims is one of the reasons given by the House Committee Report (*supra*, pp. 11-12) for differentiating between freight forwarders and shippers generally. There are differences that can be pointed out between Part IV and other parts of the act, but the relation toward shippers and toward the underlying carriers in regard to loss and damage liability are so far identical that Congress considered it appropriate to apply the Carmack and Cummins amendments in their entirety to freight forwarders.

## POINT II

### Bill of lading conditions of liability do not apply to subrogation claims against connecting carriers.

If we are correct in supposing that the uniform bill of lading, construed in the light of this legislation, refers to the carrier initially liable and required by statute to issue the through bill of lading, the case presents no further question. The bill of lading does not specify presentation of claims to a *rail* carrier. But even if this were not clear, it is established by the rule that there is only one operative bill of lading in transportation subject to this act.

It has long been settled that the conditions of liability of the receiving carrier's bill of lading—the bill of lading the statute requires—govern the liabilities of all responsible carriers, and that contrary conditions, whether in intermediate bills of lading issued the shipper, or arrangements between carriers, are inoperative, since the purpose of the Carmack Amendment was "to create in the initial carrier unity of responsibility for the transportation to destination." *Missouri, Kansas & Texas R. Co.* v. *Ward*, 244 U. S. 383, 386; *Texas & Pacific Ry.* v. *Leatherwood*, 250 U. S. 478; *Galveston Wharf Co.* v. *Ry. Co.*, 285 U. S. 127; *Mexican Light & Power Co.* v. *Texas Mexican Railway Co.*, 331 U. S. 731. The shipper's right of recovery is thus made uniform and does not depend on the circumstance of which of the responsible carriers he sues. In the *Ward* case recovery was allowed against a connecting carrier whose bill of lading had a notice of loss provision, with which the plaintiff had not complied, since the initial carrier's bill of lading had contained none; in the *Leatherwood* case, conversely, the connecting carrier was protected by a sixty day limit on suit in the initial carrier's bill of lading which its own did not contain; while in the

*Galveston Wharf* case, a dock and switching carrier was held liable by the terms of the original bill of lading in spite of provisions in its switching tariffs and contract with a line haul carrier that it should only be responsible for negligence on its part, since "the Wharf Company was not entitled to vary the liability, as determined by the terms of the through bill, by its arrangements with the Railway Company" 285 U. S. 127, 136. On familiar principles, this construction attaches to the reenactment of the Carmack Amendment by 1013, particularly a statute directed to apply "with like force and effect" as the incorporated act. *State Tonnage Tax Cases*, 79 U. S. 204; *Johnson v. Manhattan Railway Co.*, 289 U. S. 479. Consequently, a forwarder's shipper is entitled to recovery against the primarily responsible rail or motor carrier to the same extent that the forwarder is liable, rather than limited, as formerly (*Great Northern Ry. v. O'Connor*, 232 U. S. 508) by the forwarder's arrangements with them. Under these decisions it is clear that respondent might sue and recover as assignee of the shipper, and that lack of notice to connecting or underlying carriers would afford no defense. A statutory right of subrogation would hardly be less than this, since subrogation ordinarily involves succession in full measure to the rights and all remedies of the discharged creditor, as is expressly stated in the A.A.R. opinion. *Hayes v. Ward*, 4 Johns. Ch. 123; *Stanley v. Wheat*, 78 Fed. 2d 25, 30.

This is, moreover, the construction put upon the section by the petitioner's themselves over a period of many years. In the interline settlement of subrogation claims between rail carriers no notice of claim, within nine months or any other period, is made a prerequisite of liability, as is shown by the complaint, the moving papers, and the Freight Claim Rules of the Association of American Railroads, submitted with the opposing affidavits. It thus

follows, and has been conceded by petitioners, that the bill of lading conditions of notice do not apply to subrogation claims under 20(12). It is consequently true of freight forwarders' claims as well, unless, contrary to the express language of this section, it does not apply to their claims against railroads at all. Respondent's position is merely that if it is granted the same unqualified right of indemnity that is considered the due of other carriers made vicariously responsible by the same statute.

Petitioners profess to believe that treatment of forwarders' subrogation claims on the same basis as other carriers' subrogation claims against them under §20(12) would constitute a preference, and even a Court of Appeals decision has apparently not freed them from the apprehension of guilt that only they have charged. It would, on the contrary, be a discrimination against freight forwarders if petitioners succeeded in applying strictures to forwarders' claims for reimbursement that they do not apply to other regulated carriers similarly rendered responsible for their torts. The distinction between original claims of shippers and subrogation claims of carriers is not only one that the statute creates and the railroads themselves apply, but there are evident grounds for doing so. A subrogation claim does not accrue at the time of loss; it is contingent unless and until the creditor is paid, and on the analogous question of limitations is usually so treated. *Powers* v. *Munger*, 52 Fed. 705; *Pritchard* v. *Norfolk Southern R. R. Co.*, 166 N. C. 532; *McEvoy* v. *Waterbury*, 92 Conn. 664; *U. S. Fidelity & Guaranty Co.* v. *Union Bank & Trust Co.*, 228 Fed. 448, 453. The measure of damages under this section, as with subrogation claims generally, is not the value of the shipment but the amount the initial carrier has paid in satisfaction of the claim. Different provisions of the act deal with them. Section 20(11) deals with shippers' original claims, 20(12) with subrogation claims. The petitioners' argument is that it

is a preference if they do not, as regards freight forwarders, confuse the two, but differentiate between §20(12) claims of rail or regulated carriers other than freight forwarders, and §20(12) claims of freight forwarders.

§1013 is as much an act of Congress as the provisions generally prohibiting unreasonable preferences, and is specific. If any conflict is perceived between the specific provisions of this section and the general terms of the other, the specific controls. *Townsend* v. *Little*, 109 U. S. 504, 512. Unless it was beyond the competence of Congress to regulate freight forwarders as common carriers, and so differentiate between them and the shipping public, Congress has done so, both generally and in particular with respect to responsibility for loss and damage. Mere differentiations are not enough to constitute an unlawful preference, even one not thus specifically provided by statute. Transportation is full of differentiations of all sorts, but to be unlawful they must as well be unreasonable. Inequality in treatment to constitute a preference must differentiate between shipments "under the same circumstances of carriage." *Wight* v. *United States*, 167 U. S. 512, 518. The circumstances of carriage for a regulated transportation agency are plainly different than for shippers.

*I.C.C.* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 326, holding that different rates could not be applied between shipments of coal for railroad fuel, and commercial coal, is cited as forbidding differentiation between the subrogation claims of forwarders and the original claims of shippers. This argument proves too much. If subrogation claims against connecting carriers must be treated on the same footing as original claims of shippers, §20(12) is no less a violation of this supposed policy than §1013, and the elaborate structure of defendant's freight claim rules, having no like condition of notice, would be

patently unlawful. Citation of this emphasizes that questions of liability are not to be confused with rate questions, for while ownership of a shipment does not affect the worth of the service involved in its carriage, it is the controlling factor in the right to recover for loss.

It is also suggested that it is discrimination not to apply 20(12) to the claims of unregulated freight consolidators. The sufficient answer is that since they are, at most, private or contract carriers, subject to none of the liabilities and restrictions upon contract of 20(11), nay the common-law liabilities of common carriers, the grant of a right of subrogation to them is unnecessary. The differentiation is the historic one between private and common carriers. Any one who does perform service similar to freight forwarders, *for the general public*, is one, by definition of the act.

## POINT III

**The statute gives a forwarder recourse, in terms, against a "railroad * * * on whose lines the loss, damage, or injury shall have been sustained."**

The principal argument of petitioners is that this legislation was not designed in any way to alter the existing relation between freight forwarders and railroads, and that the scope of operation of this section is confined to the negligible number of instances where two forwarders jointly load a car. This argument, as well as leaving virtually no scope for operation of the statute, thus comes down to the flat proposition that a statute providing:

> "The * * * transportation company issuing such receipt or bill of lading * * * shall be entitled to recover from the common carrier, *railroad* * * *"

is to be construed as

"* * * shall be entitled to recover against another freight forwarder only."

This is redrafting, not construction. *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115; *U. S. v. Lexington Mill Co.*, 232 U. S. 399, 410. It contravenes both the language of the statute, and the House Report explanation of it, finding its only support in doubtful inference from other portions of the act not concerned with loss and damage liability, and random comments in Congress. While other portions of the act have no necessary bearing on the question of loss and damage liability, the fact, as expressly and repeatedly stated in Congress, was that a principal urgency for passage of the legislation was to enable rate arrangements with regulated carriers that existing legislation forbade.

Petitioners' illustration of the field of operation of §20(12) is the instance of joint loading, on the hypothesis that the shipper must sue one forwarder, that forwarder sue the other, and the latter sue the rail carrier, before the party primarily liable is brought to book." Brief, p. 31. This supposes a requirement of privity of contract for recovery against a carrier, but the occasion for such enforced circuity of action has not been present for a century. *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. 344.

The application of the section to railroads is further confirmed by the language of §1013 "in the case of service subject to this chapter." This is defined (§1002(7)) as "any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform *or provide* as a freight forwarder" with the sole exception of air carriage and motor carriage.

incidental to air carriage. "Service subject to this chapter" applies alike to the incorporated §20(11) and §20(12); if it meant the forwarder's terminal services only, the forwarder would be under no responsibility, under §20(11), for losses occurring in rail or motor carriage, and the evident and expressed purpose of the section would be thwarted. It is not and cannot be questioned that the principal object of the section was to compel forwarder responsibility for losses whether occurring in the possession of the forwarder or of rail or motor carriers they utilize, and the coverage of §20(12) as reenacted can be no narrower. The sections are plainly *in pari materia*, and it is not open to petitioners to concede respondent the liabilities of the one and deny the corresponding recourse of the other.

We believe no process of inference can be compelling enough to transform the words of a statute "common carrier, railroad or transportation company" into "freight forwarder only"; but if genuine ambiguity were present, §1013 is entitled to liberal rather than narrow construction as a remedial act. The liability provisions of §20(11) have always been given such a construction in aid of adequate recourse of shippers, much of which the defendant's arguments would deny to them in the application of §1013. The provisions of §20(12) are no less remedial and practical. Subrogation, a remedy of equity borrowed from the civil law, is of such evident justice that it is usually afforded without express provision to one vicariously liable for the fault of another, and recourse under these circumstances against a connecting carrier is an established case for its operation."

*Palmer v. Aquilines, Inc.*: 42 Fed. Sup. 239, 242; aff'd 135 Fed. 2d 689 (C.C.A. 2d);

> "The general rule as between connecting carriers at common law is that the one which has been compelled to pay for a loss or injury for which another is primarily liable is entitled to exoneration at the hands of the latter." *Powhatan Steamboat Co. v. Appomattox Railroad Co.*, 24 How. 257; *Conkey v. Milwaukee & St. Paul Railway Co.*, 31 Wisc. 619."
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> *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 184;
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> *Keystone Motor Freight Co. v. Brannon-Signaigo Cigar Co.*, 115 Fed. 2d 736.

The purpose of §20(12) was to give complete recourse to the receiving carrier thus made responsible for the torts of another. The language of this section was chosen, according to the Conference Committee reporting it, to make the indemnity as broad as the liability; "so that the liability of the carrier to the shipper and of the subsequent carrier to the original carrier are made the same". 40 *Congressional Record* 9579. The justice of the Carmack Amendment was supported in debate by the very positive expectation that—

> "If a judgment is obtained against an initial carrier, no doubt exists but that the secondary carrier would pay it at once."

40 *Congressional Record* 9580, quoted in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 201. In the latter case the constitutionality of a statute requiring the initial carrier to pay a connecting carrier's debt was sustained in part by the Court's expressed faith that as a practical matter reimbursement was assured. *Ibid.* 204.

The measure of recovery that the statute affords the receiving carrier is no less remedial and practical, in fix-

ing the recovery as the amount paid out on a judgment or settlement of a claim, rather than calling for common law proof of contents and value of a shipment. Freight loss or damage, though amounting to over a hundred million dollars yearly, involves in most instances small amounts, usually less than $250. The measure of damages is seldom a genuine issue, for the great majority are shipments from seller to purchaser, and damages are thus ordinarily readily established by the invoice price plus freight. At the same time the receiving carrier is seldom in control of competent common law evidence of contents or value, and to make its recourse depend on this would as a practical matter be a denial of recourse in many instances. The shipping public benefits by the provision as well, for it facilitates the settlement of claims of apparent merit without litigation and without jeopardising recourse against the party primarily responsible, and unquestionably contributes materially to the comparatively limited volume of freight claim litigation in the courts at the present day. These considerations are as fully applicable to freight forwarders as any other carriers, and to differentiate between them is a distinction without a difference, as well as a contradiction of the express language of the statute.

*Kansas City & M. Ry. Co. v. New York Central & H. R. R. Co.*, 110 Ark. 612, 163 S. W. 171:

> "It was the purpose of the Congress by the Carmack Amendment to the Hepburn Act to make the initial carrier liable for loss caused by it or any connecting carriers, and to give the initial carrier, after it had been required to pay the loss, a remedy over against the particular connecting carrier causing the loss, for the amount paid by the initial carrier as evidenced by 'any receipt', etc.

> The provision was intended to make the remedy of the initial carrier as complete and convenient as possible, and therefore the act provides for the simple, easy, and direct method of establishing the amount of the claim by the receipt showing the payment."

The opinion of the Court of Appeals corrects the serious misconception that was expressed by the District Court and was the basis of Representative Wolverton's disagreement with the House Report on the question of subrogation that right of recovery for loss or damage is founded on privity of contract with a carrier, and that the owner of property damaged or destroyed in the hands of a connecting or underlying carrier has no claim directly against it, so that the receiving carrier becomes subrogated to nothing.

The liability of a common carrier is, of course, based on the common law duty of a carrier of safe custody and delivery, the rule of *Coggs v. Bernard*—a liability analogous in many respects to tort liability; it does not depend on contract and frequently applies irrespective of contract conditions to the contrary; and it is the basis not only of the right of a consignee, under a straight or non-negottable bill of lading, to maintain suit, but of the rule in all jurisdictions that a connecting carrier is liable for losses occurring in its possession. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; Hutchinson, *Carriers*, 3 ed. §§ 452, 236, 1305, 1312. Indeed, except for contractual assumption or statutory imposition of liability for losses in the hands of others, the connecting carrier in whose possession the loss occurred was the only party liable, and it was for this very reason that the Carmack Amendment was enacted.

Neither is it sensible to suppose that Part IV was intended or is operative to curtail the existing alternative remedy of shippers against the carrier primarily responsible for loss. Common-law or established statutory remedies are not abolished or impaired by uncertain implication. There are many circumstances under which this additional recourse may be of value to shippers, such as circumstances of insolvency of one carrier (*Julius Kluge man's Sons* v. *Oceanic Steam Navigation Co.*, 42 Fed. [2d] 461, 463) and it has been repeatedly held that this was not of the effect of the Carmack Amendment, which was to augment rather than curtail a shipper's remedies. "Properly understood neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line." *Cincinnati & Texas Pacific Ry.* v. *Rankin*, 241 U. S. 319, 326. "The suggestion that by imposing additional liability upon the initial carrier the amendment provides an adequate remedy for shippers and therefore removes the necessity for any presumption against the terminal one and impliedly abrogates the rule is unsound. There are adequate reasons why shippers should have the benefit of both, and we think Congress so intended." *Chicago & Northwestern Ry. Co.* v. *Whitnack Produce Co.*, 258 U. S. 369, 374; *Mexican Light & Power Co.* v. *Texas Mexican Ry. Co.*, 231 U. S. 732, 733. We cannot credit an intended departure from this policy either to Representative Wolverton or any other proponents of this legislation, even if the statute had not been directed to apply "with like force and effect as in the case of persons" subject to the incorporated act. This is evidently the view of the Interstate Commerce Commission, which recently had occasion to state "That forwarders assume responsibility for loss and damage does not lessen the

responsibility of underlying carriers." *Definition of Freight Consolidators*, 48 M. C. C. 527, 535), and in explanation of a statement that a freight forwarder in turn has recourse against the "line haul carrier" referred to this section, stating "Section 413 of Part IV makes the provisions of [20(12)] of Part I applicable to freight forwarders." *Freight Forwarder Insurance*, 260 I. C. C. 375, 378. Yet petitioners continue to assert that the shipper has no right of action against the actual tort-feasor, and that only a forwarder to whom a bill of lading has been issued can recover for losses in rail carriage. Brief, pp. 31, 33.

In the District Court a principal argument was that "Liability as between common carriers for loss or damage occurring during transit exists only where the carriers publish a joint through rate". Affidavit of B. J. Wettlaufer, R. 64. This is still asserted as a serious proposition of transportation law. Brief, pp. 21, 30.

Liability under the Carmack Amendment is not in any way dependent upon joint rates or through rates. While the operational unity of the country's transportation system was a reason for the enactment of the Carmack Amendment, and the *Riverside Mills* case discussed the fact much in the idiom of the antecedent law of connecting carriers by contract, *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593, held the receiving carrier liable for loss although "The railroad had no through route or rate established with the line of steamers by which the tobacco went". The operation of the statute was then plainly placed on its terms and the authority of the Commerce Clause, and contract analogies were thereafter superfluous. In *Galveston Wharf Co.* v. *Railway Co.*, 285 U. S. 127, the Wharf Company was held liable although not a party to the through bill nor a participant in the through rate. In *American Light & Power Co.* v.

*Texas-Mexican Railway Co.*, 231 U. S. 731, the National Railways of Mexico was held a connecting carrier of the Pennsylvania, although it was stipulated that there was no contractual relation of the former with any domestic road, and no sharing of any of its revenues. Many instances exist and have always existed of rates based on a sum of aggregate charges rather than joint rates, or of fixed charges for switching and the like, but the question of sharing of rates has never affected responsibility for loss by a carrier in whose hands the loss occurred.

Another vestige of that nearly abandoned argument is the suggestion that §20(12) may apply to forwarders' claims against motor carriers, but not railroads. Brief, p. 23, p. 30, p. 31, note. In the District Court this was sought to be related to their authority to maintain joint rates; here it is sought to be derived by some hazy analogy from the fact that motor carrier pick-up agents may give receipts for the freight forwarder. Brief, p. 21, note. Neither of these circumstances has any bearing on responsibility of a carrier for losses in his possession, and neither of them can restrict the broad and unqualified grant of recourse against the "common carrier, railroad, or transportation company" of the statute in question.

The *Ward* case is sought to be distinguished on the ground, among others, that there was there no consideration for different liability than that already undertaken. The *Galveston Wharf Co.* case, however, involved nothing that the Wharf Company had already undertaken, as it performed its switching and loading services under separate filed tariffs and not as a party to the through bill of lading. The same was true of National Railways of Mexico in the *Mexican Light and Power* cases. Furthermore, the analogy of contract, fairly applicable to the

Cargnack Manufacturing Co., 271 I. C. C. 699, 702, is no longer fully applicable to the section as it has been amended. Originally its liability applied only to the initial carrier, the counterpart of a general contractor under which for the acts of its agents; now it applies to the delivering carrier as well. Originally it applied only to the exact contract made by the receiving carrier; now it applies to its terms even if a shipment is diverted or reconsigned en route to altogether different destinations, routes, rates, and connecting carriers.

Neither is it material upon the right of recovery against a responsible carrier that the particular shipment was part of a carload. To cite only two of a number of cases on the point, *Galveston Wharf Co. v. Eagle Co.*, 285 U. S. 147, sustained a recovery by nine consignees of a food cut shipment against a carrier in whose possession the loss occurred, while *Great Northern Railway Co. v. O'Connor*, 232 U. S. 508, sustained a recovery by a forwarder's shipper against an underlying rail carrier. There is obviously no force to the argument that petitioners' rules, tariffs, or practices can defeat the application of statute to them (*Merchants' Warehouse Co. v. U. S.*, 283 U. S. 501, 511; *Chicago Ry. v. McGuire Bitumen Co.*, 253 U. S. 97), and the suggestion that petitioners' *ex parte* insistence on issuance of bills of lading is a contractual waiver is no more cogent. *New York Central Railroad Co. v. The Talisman*, 288 U. S. 239. "Such transportation, whatever may have been the case, for the most part is now a matter of contract between shipper and carrier but is a matter of statutory rights and duties." *Bromagard v. U. P. R. R. Co.*, 148 I. C. C. 444, 447.

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Section 20(12) is the clearest of legislation, in terms and purpose, giving recourse against the party primarily

liable measured by what is paid in discharge of its obligation. It is explicit in including railroads. When there is added to this the definition of the coverage of [illegible] as "all the services which any person undertakes to perform *or procure* as a freight forwarder", with the exception of air carriage only, the application of the statute to railroads is as clear as plain words can convey.

**The judgment of the Court of Appeals should be affirmed.**

Respectfully submitted,

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